No. 10639

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, Doing Business as CHASKIN CITRUS CO.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

CASES. **PAGE**

STATUTES.

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There is little in the appellee's brief that has not been fully answered in our opening brief. In substance, the appellee relies entirely upon the decision of the District Court for the Eastern District of Kentucky in the case of *Downey v. Geary-Wright Tobacco Company,* 39 F. Supp. 33. That case is readily distinguishable from the instant case, and the holding does not support the appellee's contention.

In the first place, removal in the *Downey* case was had, not upon the ground that it was one arising under the Constitution or laws of the United States, but that it was one arising under the law regulating commerce, original jurisdiction of which is conferred upon the District Courts of the United States by Section 24(8) of the

Judicial Code, 28 U. S. C. A. Sec. 41(8). As the District Judge said:

> "The sole question is whether this is a suit which 'arises under any law regulating commerce.'"

In the second place, the District Court in the *Downey* case points out that Congress has expressly declared that the marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce, and has therefore found it necessary and appropriate to regulate and control such marketing. The same cannot be said of oranges grown in the State of California, or elsewhere for that matter, concerning which Congress has made no similar declaration and has established no corresponding regulation or control.

Finally, in the *Downey* case the Court emphasized the fact that the plaintiff's complaint, for himself and on behalf of all other persons similarly situated, asked the Court to declare the rights and duties of the parties

> "in respect to a transaction which so directly affects interstate commerce that, in the exercise of its constitutional powers, the Congress has seen fit to regulate it and to prescribe the rights and duties of parties participating in it. . . . *The plaintiff thus makes the determination and declaration of the law of the United States governing the rights and duties of the parties an essential element of his case.* He presents a claim and discloses a controversy of such a nature that it can only be correctly determined by a declaration of the law under and in the light of the Act of Congress and the regulations made pursuant thereto. *This is disclosed upon the face of the complaint without anticipating defenses and unaided by*

> *the petition for removal.* . . . Obviously in rendering any judgment predicated upon the facts set out in the petition and in response to its prayer for a declaration of the rights and duties of the parties in respect to the transaction described, *the federal question could not be avoided even if no answer were filed and no defense of any character made."* (Emphasis added.)

Thus, viewed in the light of the particular pleading presented to the Kentucky District Court, the decision in the *Downey* case is in strict conformity with the authorities cited and relied upon by the appellant. To give that decision the broad and loose interpretation which the appellee seeks to place upon it would directly contravene those controlling authorities.

As for the rest of the appellee's brief, the only other point sought to be made is that judicial notice will be taken of the identity of employees of the government, and of the extent of their authority and the scope of their duty, and likewise of the laws of Congress "attempting to regulate the marketing of citrus fruits in interstate commerce," and of "the fact that these laws are administered by employees of the Department of Agriculture." In this connection, it is a curious fact that the appellee apparently loses sight of the fact that this is a suit between individuals, and repeatedly refers to the position and contentions of the government, as if the United States were a party to the action.

The cases on judicial notice go no farther than to authorize the courts to take judicial notice of the occupants of offices created by statute and the duties of which are so defined. To go beyond that would be

absurd when government employees are numbered in the millions and when the duties of so many of them are the subject of such widespread wonder and doubt. And even if the appellee were an employee of the government and the Court could take judicial notice of such employment in the absence of any allegation thereof in the complaint, that would not serve to make the case removable. As was said in the case of *Mountain View M. & M. Co. v. McFadden,* 180 U. S. 533, cited in our opening brief (p. 535):

> "But the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading."

Granted that judicial notice may be taken of the laws of Congress, we submit that there is no law of Congress "attempting to regulate the marketing of citrus fruits in interstate commerce." We further point out that there is no reference in the complaint to interstate commerce, and nothing to indicate that the contracts and business relations with which the appellee is alleged unlawfully to have interfered extended beyond the borders of the State of California. And we confidently submit that there is no law or regulation of which judicial notice could be taken authorizing such conduct as that complained of, even on the part of a government employee.

A complete answer to the question of the removability of this case is to be found in the test prescribed by countless authorities, that to render an action removable it is necessary that it could have been originally brought in the Federal Court. As the Supreme Court stated in the

case of *In re Winn,* 213 U. S. 458, cited in our opening brief (p. 465):

> "In substance, the allegations of the petition for removal are, that the defendant was subject to the Federal laws to regulate commerce, and that under those laws the defendant had a defense in whole or in part to the cause of action stated in the declaration. *But the cause of action itself is not based upon the interstate commerce law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto."* (Emphasis added.)

Application of that test to the complaint in the present case conclusively shows the complete absence of anything which would have conferred upon the District Court jurisdiction to entertain the suit in the first instance, and it therefore follows that the Court below could acquire no jurisdiction by removal.

In conclusion, we note that the appellee has made no attempt to answer Point II in our opening brief, namely, that the evidence, the findings of fact, and the conclusions of law do not support the order and judgment from which this appeal is taken. We believe that this point alone is sufficient to require a reversal; and for that reason, as well as for the other reasons presented, we submit that the order and judgment appealed from should be reversed, with direction to remand the cause to the State Court.

Respectfully submitted,

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Attorney for Appellant.